An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-324

No. COA21-406

Filed 17 May 2022

Wake County, No. 20 CVS 10329

JENNIFER LEE RACINE, Individually, and as Administratrix of the ESTATE OF SCOTT TIMOTHY RACINE, Plaintiffs,

v.

CITY OF RALEIGH and the RALEIGH POLICE DEPARTMENT, Defendants.

Appeal by Plaintiff from order entered on 10 March 2021 by Judge Vince M. Rozier in Wake County Superior Court. Heard in the Court of Appeals 9 February 2022.

The Francis Law Firm PLLC, by Charles T. Francis and Alan D. Woodlief, Jr., for the Plaintiff-Appellant.

Raleigh City Attorney Robin L. Tatum, by Dorothy V. Kibler, for the Defendants-Appellees.

JACKSON, Judge.

¶ 1 Jennifer Lee Racine ("Plaintiff"), individually and as administratrix of the Estate of Scott Timothy Racine, appeals from the trial court's order granting the City of Raleigh and the Raleigh Police Department's ("RPD") (collectively, "Defendants") motion to dismiss. We affirm the order of the trial court.

I. Background

¶ 2 On 13 September 2018, Geoffrey Shobel drove to the BP gas station at the corner of Hillsborough Street and Gorman Street in Raleigh, North Carolina, at 12:15 p.m. Mr. Shobel exited the vehicle to enter the BP station to prepay for gas, then returned to his vehicle, sat in the driver's side seat, and passed out. When Mr. Shobel was unconscious for over 45 minutes, BP employees called the police, and police officers were dispatched to the gas station.

¶ 3 The officers aroused and interacted with Mr. Shobel. They asked for permission to search the vehicle, and while Mr. Shobel initially agreed, he subsequently changed his mind and refused. The officers asked for Mr. Shobel's driver's license and discovered that it was revoked. Then they asked Mr. Shobel to move and park his vehicle and told him not to drive. They did not take Mr. Shobel into custody, take his keys, or otherwise disable the vehicle.

¶ 4 After the police had left, Mr. Shobel got back into the vehicle and began driving away from the gas station. At approximately 1:13 p.m., his vehicle veered off Hillsborough Street onto the curb, striking Scott T. Racine, a pedestrian who was walking on the sidewalk at the time. Mr. Racine suffered multiple blunt force injuries from the collision. He died from his injuries five days later.

¶ 5 Plaintiff initiated this action in Wake County Superior Court on 16 September 2020. Plaintiff's complaint asserts claims for wrongful death and negligent hiring,

training, supervision, and retention. Defendants filed a motion to dismiss Plaintiff's claims under Rule 12 of the North Carolina Rules of Civil Procedure on 23 October 2020.

¶ 6 The matter came on for hearing before the Honorable Vince M. Rozier on 17 February 2021. The trial court granted Defendants' Motion to Dismiss in an order entered on 10 March 2021, concluding that RPD lacked the capacity to be sued and thus no claim could be asserted against RPD as a matter of law and that the public duty doctrine barred Plaintiff's claims for wrongful death and negligent hiring, training, supervision, and retention.

¶ 7 Plaintiff entered timely written notice of appeal on 1 April 2022.

II. Analysis

A. Standard of Review

> A Rule 12(b)(6) motion tests the legal sufficiency of the pleading. A Rule 12(b)(6) motion will be granted (1) when the face of the complaint reveals that no law supports plaintiff's claim; (2) when the face of the complaint reveals that some fact essential to plaintiff's claim is missing; or (3) when some fact disclosed in the complaint defeats plaintiff's claim. We treat all factual allegations of the pleading as true but not conclusions of law. In sum, a Rule 12(b)(6) motion asks the court to determine whether the complaint alleges the substantive elements of a legally recognized claim.

Sterner v. Penn, 159 N.C. App. 626, 628-29, 583 S.E.2d 670, 672 (2003) (cleaned up).

On appeal, "[t]his Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003) (internal marks and citations omitted).

B. The Public Duty Doctrine

¶ 8 In her sole argument on appeal, Plaintiff contends that the public duty doctrine does not apply in this case, or that an exception to it should be recognized where the affirmative actions of law enforcement place an innocent person in peril. We disagree.

Under the public duty doctrine,

> a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals. This rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act.

Braswell v. Braswell, 330 N.C. 363, 370-71, 410 S.E.2d 897, 901 (1991) (citations omitted). The purpose of the doctrine is to avoid imposing an "unreasonable hindsight based standard of liability" on law enforcement. *Lassiter v. Cohn*, 168 N.C. App. 310, 318, 607 S.E.2d 688, 693 (2005). "Because the public duty doctrine says that there is a duty to the public generally, rather than a duty to a specific individual, the doctrine operates to prevent plaintiffs from establishing the first element of a negligence claim—duty to the individual plaintiff." *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 5,

727 S.E.2d 675, 679 (2012). Accordingly, "individual members of the public as plaintiffs generally may not enforce that duty in tort." *Strickland v. Univ. of N.C. at Wilmington*, 213 N.C. App. 506, 509, 712 S.E.2d 888, 890 (2011).

¶ 9 The General Assembly codified the doctrine in 2008 by enacting N.C. Gen. Stat. § 143-299.1A. *Ray*, 366 N.C. at 6, 727 S.E.2d at 680. Specifically, N.C. Gen. Stat. § 143-299.1A(a)(1) provides that

> the public duty doctrine is an affirmative defense on the part of the State department, institution, or agency against which a claim is asserted if and only if the injury of the claimant is the result of any of the following:
>
> > (1) The alleged negligent failure to protect the claimant from the action of others or from an act of God by a law enforcement officer as defined in subsection (d) of this section.

N.C. Gen. Stat. § 143-299.1A(a)(1) (2021). Subsection (d) defines "law enforcement officer" as

> a full-time or part-time employee or agent of a State department, institution, or agency or an agent of the State operating under an agreement with a State department, institution, or agency of the State who is any of the following:
>
> > (1) Actively serving in a position with assigned primary duties and responsibilities for prevention and detection of crime or the general enforcement of the criminal laws of the State or serving civil processes.
> >
> > (2) Possesses the power of arrest by virtue of an oath administered under the authority of the State.

> (3) Is a juvenile justice officer, chief court counselor, or juvenile court counselor.
>
> (4) Is a correctional officer performing duties of custody, supervision, and treatment to control and rehabilitate criminal offenders.
>
> (5) Is a firefighter as defined in G.S. 106-955(1).
>
> (6) Is a probation officer appointed under Article 20 of Chapter 15 of the General Statutes.

Id. § 143-299.1A(d). Our Supreme Court has held that N.C. Gen. Stat. § 143-299.1A(a)(1) "includes the *Braswell* holding for law enforcement officers." *Ray*, 366 N.C. at 7, 727 S.E.2d at 680.

¶ 10 Under N.C. Gen. Stat. § 143-299.1A(b), there are three exceptions to the public duty doctrine:

> (1) Where there is a special relationship between the claimant and the officer, employee, involuntary servant or agent of the State.
>
> (2) When the State, through its officers, employees, involuntary servants or agents, has created a special duty owed to the claimant and the claimant's reliance on that duty is causally related to the injury suffered by the claimant.
>
> (3) Where the alleged failure to perform a health or safety inspection required by statute was the result of gross negligence.

N.C. Gen. Stat. § 143-299.1A(b) (2021). Under the special relationship exception, the relationship

> must be specifically alleged, and is not created merely by a showing that the [S]tate undertook to perform certain duties. A special relationship depends on representations or conduct by the police which cause the victim(s) to detrimentally rely on the police such that the risk of harm as the result of police negligence is something more than that to which the victim was already exposed.

Lane v. City of Kinston, 142 N.C. App. 622, 625, 544 S.E.2d 810, 813 (2001) (cleaned up). The special duty exception applies where (1) there is an actual and overt promise of protection made by police, (2) there was reasonable reliance on the promise by the plaintiff, and (3) a causal relationship exists between the reliance and the subsequent injury. *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902 (internal marks and citations omitted).

¶ 11 We hold that none of the exceptions apply here and that the public duty doctrine bars Plaintiff's claims. Mr. Shobel was responsible for Mr. Racine's death, not the police officers who failed to take him into custody or disable his vehicle on 13 September 2018. That the officers failed to control Mr. Shobel did not create any future obligation to unknown parties that might or might not be threatened or harmed. Indeed, the facts of this case illustrate the necessity of the doctrine: "placing [an] unreasonable hindsight based standard of liability upon a police officer when performing public duties [] is exactly that which the public duty doctrine seeks to alleviate." *Lassiter*, 168 N.C. App. at 318, 607 S.E.2d at 693. Plaintiff has not alleged that the officers had a special relationship with or owed a special duty to Mr. Racine,

as would be required for her complaint to survive Defendants' motion to dismiss.

¶ 12 Finally, Plaintiff has no valid claim for negligent hiring or retention against Defendants because Mr. Shobel was the tortfeasor who caused Mr. Racine's death and Mr. Shobel was not an employee of Defendants. *See, e.g.*, *Foster v. Crandall,* 181 N.C. App. 152, 170-71, 638 S.E.2d 526, 538-39 (2007) (holding that there can be no claim for negligent supervision where the defendant never employed the person who committed the tortious act). A claim for negligent supervision and training against an employer is derivative from and dependent on the existence of a viable claim against an employee, *Prior v. Pruett*, 143 N.C. App. 612, 622, 550 S.E.2d 166, 172-173 (2001), and there can be no derivative claim against the City of Raleigh because Plaintiff has no claim against the officers. Accordingly, we hold that the trial court did not err in granting Defendants' motion to dismiss.

III. Conclusion

¶ 13 For the foregoing reasons, we affirm the order of the trial court.

AFFIRMED.

Judges DIETZ and MURPHY concur.

Report per Rule 30(e).